Supreme Court, U.S.
FILED

No. 98 1140 NOV 16 1998

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN WINTERS, SR., Individually And As Representative Of The Estate of Margaret Winters, Deceased; Fr. Martin Winters and Charles Winters

Petitioners

v.

DIAMOND SHAMROCK CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL INCORPORATED; HERCULES INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, also known as Thompson Chemical Corporation; T H AGRICULTURE & NUTRITION COMPANY, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

After this state court case, involving alleged injury from exposure to Agent Orange in Vietnam, had been removed to federal court pursuant to 28 U.S.C. 1442(a)(1), the officer removal statute, the courts below denied the plaintiff's motion to remand, in direct conflict with the leading case on such removal, the decision of Judge Jack B. Weinstein in *Ivy/Ryan* (see cite, ftnte 2, infra). The judgment below presents the following questions:

I.

Whether the chemical company defendants – in view of the undisputed fact that Agent Orange was simply an off-the-shelf mix of pre-existing chemical formulae that had, long before defendants sold it to the Government, been put to domestic commercial use to reduce unwanted vegetation along roads and railroad tracks and on farms – failed to satisfy their burden to show that, in furnishing Agent Orange to the Military for use in Vietnam, they were subjected to the required detailed control by federal authority with respect to the acts for which the defendants were being sued in state court and that there was sufficient causal connection between what the defendants did under asserted official authority and what they were being sued for in the

state court, all as required for the defendants to be able properly to remove this case to federal court under 28 U.S.C. 1442(a)(1) ?

II.

Whether – since Judge Weinstein in *Ivy/Ryan* decided the precise issues of whether there was sufficient detailed control by the government and causal connection between such alleged control and what the defendants were being sued for in the state court suit, against the same defendants in this case after said defendants had vigorously argued and presented their position before Judge Weinstein – the defendants in this case should have been collaterally estopped with respect to those issues ?

III.

Whether corporations are "persons" within the meaning of 28 U.S.C. 1442(a)(1) ?

INTERESTED PARTIES

John Winters, Sr., Individually And As Representative Of The Estate Of Margaret Winters, Deceased[1]	–	Petitioner
Fr. Martin Winters	–	Petitioner
Charles Winters	–	Petitioner
DIAMOND SHAMROCK CHEMICALS COMPANY	–	Respondent
DOW CHEMICAL COMPANY	–	Respondent
MONSANTO COMPANY	–	Respondent
UNIROYAL, INC.	–	Respondent
HERCULES, INC.	–	Respondent
THOMPSON-HAYWARD CHEMICAL COMPANY	–	Respondent
T H AGRICULTURE & NUTRITION COMPANY, INC.	–	Respondent

[1] Ms. Winters was still alive when this litigation was commenced. She finally succumbed to the disease which plaintiffs alleged was caused by her exposure to Agent Orange – non-Hodgkins Lymphoma ("NHL") - while this case was pending in the courts below. The appropriate parties (under Texas law, the Estate and the surviving family) were impleaded but the court of appeals mandated that the case be styled as initially filed. However, after consulting with the Office of the Clerk of this Court, Petitioners are styling the Petition as it should be styled in view of the death of Ms. Winters. For convenience, Petitioners will be referred to as "plaintiff" throughout this Petition and the Respondent chemical companies will be collectively referred to as "defendants".

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed both the district court's refusal to remand this case to state court and the grant of summary judgment, is reported at 149 Fed. 3d 387 (5th Cir. 1998) and reprinted in the Appendices, A-38 to A-80. The decisions and orders of the United States District Court for the Eastern District of Texas, the first, refusing to remand this case to state court, is reported in 901 F. Supp. (E.D. Tex. 1995) and reprinted in the Appendices, A-1 to A-22, and the second, granting summary judgment on the ground of statute of limitations, is reported at 941 F.Supp. 623 (E.D. Tex. 1996) and reprinted in the Appendices, A-23 to A-37.

JURISDICTION

The decision of the court of appeals was entered on Aug. 17, 1998. This Petition is being mailed and post-marked on Nov. 16, 1998, the ninetieth day, Nov. 15, 1998, being a Sunday and the first business day thereafter being Monday, Nov. 16, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sect. 1254(1).

STATUTORY PROVISION

28 U.S.C. Section 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition In the Courts Below

Margaret Winters, who was then still alive, filed suit in the Beaumont state court on Feb. 5, 1993. Ms. Winters asserted causes of action only under state law. She alleged she served in Vietnam as a civilian employee of the Agency for International Development in 1966 – 1967; that, while there, she was exposed to Agent Orange, a herbicide the U.S. military was spraying in the environment in Vietnam in order to defoliate the jungle and for other purposes; that in 1983 she was diagnosed as having Non-Hodgkin's Lymphoma ("NHL"), a cancer that is usually fatal; that, in the latter part of 1991, she read in a Chicago newspaper that the Government had just declared that Agent Orange could cause NHL;

that she then filed this suit within a reasonable time thereafter and within two years of her discovery that Agent Orange may have caused her NHL; that the defendants formulated, manufactured and sold to the U.S. Government the Agent Orange to which she was exposed; that the Agent Orange was defective and unreasonably dangerous; that defendants were liable under state law theories of negligence, strict product liability, breaches of warranties and violation of the Texas Deceptive Trade Practices Act; and that she was entitled to actual and punitive damages.

The defendants removed the case to the federal court. Defendants asserted only two grounds for removal:

1. That defendants, in selling the Agent Orange to the U.S. Government, were acting under federal officers and were being sued for acts under the color of such office, and thus were entitled to removal jurisdiction under 28 U.S.C. 1442(a)(1).

2. That, "under the doctrine of complete federal preemption", which they asserted arose out of military procurement, defendants were entitled to removal under federal question jurisdiction as provided for in 28 U.S.C. Sect. 1441.

Plaintiff filed a motion to remand, which was later amended and supplemented. The plaintiff essentially contended that 1442(a)(1) did not apply because, in view of the *Ivy/Ryan* decision,[2] defendants were collaterally estopped from seeking removal on the basis of 1442(a)(1); the defendant corporations were not "persons" within the meaning of 1442(a)(1); defendants were not "acting under color of federal authority" when they committed the acts at the core of the state court lawsuit; that there was inadequate causal connection between what the defendants did while allegedly acting under federal authority and the state court lawsuit; and that neither the military contractor defense nor the Defense Production Act, 50 U.S.C., App. Sect. 2061, et. seq., constituted "colorable federal defenses" within the meaning of 1442(a)(1).

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[2] *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), interl. appl. den. twice by 2nd Circ. (May 8 and June 8, 1992, No. 92-8008); mand/appl. re remand dism. by 2nd Circ. (June 16, 1992, No. 92-847), sub. nom. *Ivy, et al. v. Diamond Shamrock, et al.*; cert. den. 113 S.Ct. 599 (1992) (hereafter referred to as "Ivy/Ryan").

The case was, over the surprising objection of the defendants,[3] transferred by the Judicial Panel On Multi-District Litigation to Judge Jack Weinstein in the Western District of New York. Judge Weinstein later transferred the case back to Judge Cobb in the Eastern District of Texas, and did so without having ruled on the plaintiff's motion to remand.[4]

Judge Cobb denied the plaintiff's remand motion, App. A-1 to A-22, 901 F.Supp. 1195, holding that the court had removal jurisdiction solely on the basis of 1442(a)(1). Judge Cobb did not address the preemption/federal question ground for removal and it was not a basis for the denial of the motion to remand.

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[3] As noted in plaintiff's response to the Judicial Panel on Multi-District Litigation ("JPMDL"), the defendants in past Agent Orange cases had always contended that such cases should be transferred by the JPMDL to Judge Jack Weinstein of the Eastern District of New York. But, when they found out that this case, upon removal, had landed in the court of Judge Howell Cobb, defendants reversed their position 180 degrees and opposed transfer by the JPMDL. The obvious reason for this switch in positions: Judge Weinstein had ruled in *Ivy/Ryan* that the cases of civilian Agent Orange plaintiffs were not subject to 1442(a)(1) removal and should be remanded to the state court, while Judge Cobb had ruled in an analogous suit arising out of actions by a government contractor, that it was subject to 1442(a)(1) removal and should not be remanded to state court. See *Akin v. Big Three Industries*, 851 F.Supp. 819 (E.D.Tex. 1994).

[4] Plaintiff had vigorously objected to Judge Weinstein's decision to transfer the case back to Beaumont. The first thing he should have done is determine whether he had federal jurisdiction over the case and rule on the motion to remand. See *Allen v. Ferguson*, 791 F.2d 611 (7th Circ. 1986); *Armstrong v. Alabama Power Co.*, 667 F.2d 1386 (11ths Circ. 1982); *BancOhio Corp. v. Fox*, 516 F.2d 29 (6th Cir. 1975); and *Jones Store Co. v. Hammon*, 424 F.Supp. 494, 499 (E.D. Mo. 1977) but see *Villar v. Crowley Maritime Corporation*, 997 F.2d 883 (5th Cir. 1994) cert. den. 114 S.Ct. 690 (1994). Plaintiff believes that it was error for Judge Weinstein to transfer the case back to Judge Cobb without having resolved the removal/remand issue, but that error is not being presented in this Petition.

Next, the defendants filed two motions for summary judgment, one based on the military contractor defense and the other based on the statute of limitations. The plaintiff sought depositions and extensive discovery with respect to these motions and, in partial response thereto, the court set a telephone "management conference". At the conference, the court stayed all discovery and directed the plaintiff to write a letter stating the specific discovery she wanted and why she felt she was entitled to it. The court expressly extended the time for the plaintiff to respond to both motions until after it ruled on plaintiff's request for discovery and the court would then notify the parties of the date the plaintiff's responses would be due.

The plaintiff duly and timely wrote the court a fifteen-page letter, listing the discovery that was needed in order to respond to the defendants' motions. Without any ruling on plaintiff's requested discovery, without any notice to plaintiff that it was about to rule and without the plaintiffs' having been given a real opportunity to respond to the defendants' motions, the court granted the defendants' motion for summary judgment on the ground of limitations. 941 F.Supp. 617, A-23 to A-37. The court never addressed the military contractor defense motion.

The plaintiff timely filed a motion for new trial and, in that motion, the plaintiff vigorously complained about the court granting the summary judgment without ruling on the discovery requests, without notifying plaintiff when the responses would be due and without advising the parties that it intended to go ahead and rule. Attached to the motion for new trial was factual information clearly demonstrating that a disputed fact issue with respect to the discovery rule existed. See excerpts from said motion, A-81 to A-91. The district court denied the motion for new trial.

During the pendency of the case before the district court, Ms. Winters died and, with leave of court, plaintiff amended to implead the Estate of Margaret Winters and the survivors.

The plaintiff timely appealed and the court of appeals, 149 F.3d 387 and A-38 to A-80, held as follows:

1. That plaintiff's contention that defendants were collaterally estopped was properly rejected by the trial court on one single ground (the court of appeals implicitly conceded that all other elements of collateral estopped were present): since the first judgment was a remand judgment - concerning which, the court of appeals contended, defendants had no right to appeal (even though they were granted an interlocutory appeal and also sought a mandamus) – out of fairness, application of collateral estoppel must be rejected. 149 F.3d at 391-396; A-42 to A-58.

2. In direct conflict with *Ivy/Ryan*, that the defendants were acting under the authority of the government and there was adequate causal connection between what defendants were doing while so acting, and the plaintiff's state court lawsuit, thus justifying removal under 1442(a)(1). 149 F.3d at 396-400; App. A-58 to A-67.

3. That the defendant corporations were "persons" within the meaning and intent of 1442(a)(1). 149F.3d at p. 397; App. A-42.

4. That both the military contractor defense and the Defense Production Act presented "colorable defenses" to the plaintiff's state court action. 149 F.3d at p. 400, 401; App. A-67 to A-71.

5. That the district court erred in deciding the summary judgment motion without notice to plaintiff but such error was harmless because plaintiff filed her deposition with the motion for new trial and such deposition was considered by the court of appeals. 149 F.3d at 401, 402; A-72 to A-74. and

6. That the defendants' summary judgment was properly granted on the ground of limitations. 149 F3d at 402 – 404; A-74 to A-79.

B. Statement of Facts.

1. Evidence re Removal.

With reference to the removal/remand question, the defendants submitted several affidavits, two by their own lawyers, and a number of exhibits. The defendants also filed a Memorandum of Law In Opposition to Remand. The affidavits included those of Brock, Gordon, McCarville and Frawley, with attachments and exhibits included in several volumes marked "Document 12" and Documents of Hercules Inc., Vols. I. and II. (all hereafter referred to as "defendants' remand evidence"). All of defendants' remand evidence submitted in this case, including the affidavits of Brock, Gordon, Frawley and McCarville, and all documents described above, were prepared before this case was even filed; it was all prepared for, and submitted to, Judge Weinstein in *Ivy/Ryan* and was all fully considered by him in regard to his decision to remand the *Ivy/Ryan* (Brown and White) civilian cases. See his discussion of this same "evidence", 781 F.Supp. at 937, 938, and the discussion of the law in connection therewith, 781 F.Supp. at 950-952. Therefore, there was no need to include this voluminous evidence in the Appendices to this Petition. As Judge Weinstein noted, the evidence was undisputed on the key points relating to Government control and causal connection between such control and the allegations in the state court action.

A reading of those affidavits and exhibits fully establish that Judge Weinstein was correct in holding that the Agent Orange was purchased by the U.S. off-the-shelf or, as he phrased it, the Agent Orange consisted only of "ready-to-order" products. For example, in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Remand, Doc. 12, Michael Gordon, one of the defendants' lawyers in this case, discusses in his affidavit how defendants had been "commercially" producing 2,4-D and 2,4,5-T before the Government asked them to mix the two and sell the mixture to the Government as Agent Orange. The essence of defendants' complaints in their affidavits center upon the contention that the Government "misused" the Agent Orange. "Misuse" is a potential defense to the merits, not grounds for removal under 1442(a)(1). As to the effect of "ready-to-order" purchases, see Judge Weinstein's findings at 782 F.Supp. at 937, 938, 950, 951.

The "evidence" produced by defendants also demonstrates that, while some general requirements were imposed by the Government, the Government actually had no control over the design, formulation and manufacture of 2,4-D and 2,4,5-T. See discussion of defendants' remand evidence and findings of Judge Weinstein as to lack of required control, 781 F.Supp. at 947, 948, 950, 951. Moreover, the evidence produced by defendants did not establish a causal nexus between the allegations in the

state court suit and what the "officer or agent has done" under the alleged control of the Government, id., and see findings of Judge Weinstein as to lack of causal nexus, 781 F.Supp. at 945, 946, 950, 951. The evidence concerning 1442(a)(1) is further discussed, infra, under "Reasons For Granting Writ."

2. Evidence re Statute of Limitations

As to the statute of limitations issue, Ms. Winters expressly testified that she did not "hear about spraying of Agent Orange when (she) was in Vietnam in 1966 and '67". See excerpts of Ms. Winters' deposition attached to her motion for new trial, App. A-81 to A-91.

Ms. Winters testified as follows:

Q: "Okay. When is the first time – now, this is a very important question. Think about it before you answer, because you're answering under oath.

A: Yes.

Q: When is the first time – tell the jury when is the first time that you ever heard non-Hodgkin's disease lymphoma mentioned in connection with or in association with exposure to Agent Orange?
When? . . .

A: It was in the Chicago Sun Times, and it was on the front page. It was right at the bottom that the government – I believe the president or – had signed legislation that would compensate veterans who had suffered – who had been exposed to Agent Orange and had non-Hodgkin's lymphoma.

Q: And that was the first time you ever heard –

A: That was the first time."

pp. 245-247 of Dep. Exc.; Rec. 724-726; App. A-81 to A-91.

Ms. Winters testified that she read that Sun Times article in 1991, or much less than two years prior to the date suit was filed. After reading the Sun Time's article, Ms. Winters got her nephew, who was a lawyer, to look into the situation and he began, on her behalf, an intensive and certainly diligent effort to ascertain if Ms. Winters had a viable lawsuit and, if she did, to secure her a lawyer. He eventually got in touch with the American Trial Lawyers Association and they recommended the undersigned counsel, who filed suit well within two years of the date Ms. Winters first learned that there might be a connection between NHL and Agent Orange exposure. App. A-81 – A-91.

REASONS FOR GRANTING THE WRIT

I.

In View Of Conflicts Among The Federal Courts, The Officer Removal Statute Urgently Needs Consideration By This Court On The Questions Of 'Acting Under' Federal Authority And Causal Connection With The State Court Action.

The Officer's Removal Statute, 28 U.S.C. 1442(a)(1), provides in relevant part as follows:

> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act, under color of such office or on 'account,' of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

In *Ivy/Ryan,* Judge Weinstein articulated the relevant history of the statute. 781 F. Supp. at 941 – 943. He pointed out that the statute's "earlier incarnations were drafted to protect officials who faced state government resistance to specific federal laws." id at 941. He noted, as an example, that in 1932 South Carolina authorized state "criminal prosecution of federal tariff collectors." id. at 942. He discussed several amendments to the statute until it reached its present form in 1948, with the codification of section 1442(a)(1) – (4). Under this last version, Congress extended the right of removal to any executive branch officer or "person acting under him" rather than just to revenue officers. Quoting from *New Jersey v. Moriarity*, 268 F. Supp. 546, 555 (D.N.J. 1967), Judge Weinstein noted that the additions to, and modifications of, the statute "left unchanged the basic theory and purpose of the removal privilege: that the officer was entitled to – and the interest of national supremacy required – his protection in actions brought against him which attacked and threatened him with personal liabilities or penalties." 781 F. Supp. at p. 942.

Judge Weinstein then discussed this Court's history with regard to actions under 1442(a)(1) – first *Willingham v. Morgan*, 395 U.S. 402, 89

S.Ct. 1813 (1969) holding that the statute should not be given "a narrow grudging interpretation", 89 S.Ct. at 1816, and later *Mesa v. California,* 489 U.S. 121, 109 S.Ct. 959 (1989), in which, as Judge Weinstein pointed out, the Court "signaled a narrowing of section 1442." Id at 943.

Judge Weinstein then pertinently noted:

> "The restrictive approach in *Mesa* reflects concern by the Court over the rapid expansion of federal court jurisdiction. Between the time of *Willingham* and *Mesa*, for example, the courts found section 1442(a)(1) conferred jurisdiction in a broad array of cases well outside the paradigm case of the individual official being intimidated by the threat of civil or criminal prosecution in state courts....
>
> On the heels of *Mesa* came the further restriction of section 1442(a)(1) removal in *International Primate Protection League v. Administrators of Tulane Educational Fund*, --- U.S. ---, 111, S.Ct. 1700, 114 L.Ed.2d 134 (1991). Rejecting the view of some circuits, the Court held that state court suits naming only a federal agency (rather than a particular official) as defendant were not removable under section 1442(a)(1) because a federal agency was neither an 'officer of the United States' nor a 'person acting under him.' Justice Marshall, who twenty-two years earlier had authored *Willingham*, emphasized the limited focus of section 1442 by holding that the statute ought to be interpreted as if it reads 'officer of the United States or of an agency thereof.'
>
> The Court also reasoned that, in protecting officials rather than agencies, Congress sought to distinguish lawsuits on the basis of their susceptibility to state court manipulation. Congress wished to protect individual officials because, typically, they would be relying on an official immunity defense, a type of defense 'fraught with difficulty and subject to considerable manipulation.' *Id.* 111 S.Ct. at 1709. By contrast, suits against agencies are more straightforward, leaving hostile state courts with less room to discriminate."

781 F. Supp. at p. 943.

Judge Weinstein thus pinpointed one of the reasons the Court needs to grant writ of certiorari in this case – some courts, in cases involving government contractors, have opened the door to 1442(a)(1) removal much wider than Congress ever intended. See cases discussed in 781 F.Supp. at 947-949. One case cited was *District of Columbia v. Landmark Services, Inc.*, 411 F. Supp. 1002 (D.D.C. 1976), which involved removal because defendant had a contract with the District of Columbia to operate a bus service. In the same vein, a group of decisions have been handed down since *Ivy/Ryan* taking the government-contractor concept to its furthest extreme. See *Akin v. Big Three Industry Inc.* 851 F. Supp. 819, 822 (E.D. Tex. 1994); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099 (D.C. Md. 1993) and *Fung v. Abex Corp.*, 816 F. Supp. 569, 571-72 (N.D. Cal. 1992). The point is that the court below and other courts are, we submit, using Sect. 1442(a)(1) to justify removals that go far beyond the original intent of Congress and the implications of this Court's prior precedents.

Another reason the Court should grant writ of certiorari is the direct conflict between the court below and *Ivy/Ryan* on the question of Section 1442(a)(1) removal. This case and *Ivy/Ryan* both involve the same defendants; they both involve civilians who were exposed to Agent Orange in Vietnam; they both involve the same issue concerning removal; and they both involve precisely the same evidence with regard to the removal issue.

Judge Weinstein – whom no one can question is the preeminent authority on the Agent Orange litigation [5] – after holding that the defendant corporations were "persons" within 1442(a)(1), [6] and that defendants had asserted colorable federal defenses, id at 944-946, then addressed the core issue: "When Is A Person 'Acting Under' An Officer" within the meaning of 1442(a)(1). He concluded that, in making that determination, the controlling rule is:

> "The rule established is that removal by a 'person acting under' a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit, were performed

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[5] See Agent Orange on Trial by Prof. Peter Schuck, Harvard Univ. Press.

[6] Judge Weinstein, in so holding, noted the split in authorities on this issue: "Federal courts are divided on the question. Compare *C.H. v. American Cross*, 684 F.Supp. 1018, 1023-24 (E.D. Mo. 1987) ('person' in 1442(a)(1) refers to natural person) and *Roche v. American Red Cross*, 680 F.Supp. 1504, 1508-10 (E.D. Wis. 1985) (same) with *Peterson v. Blue Cross/Blue Shield*, 508 F.2d. 55, 58 (5th Circ.) ('person' not limited to natural person), cert denied, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); *Bakalis*, 781 F.Supp. at 143-44 (same); *Group Health Inc. v. Blue Cross Ass'n*, 587 F.Supp. 887, 890 (S.D.N.Y. 1984) (same)."

781 F.Supp. at 946.

> pursuant to an officer's direct orders or to comprehensive and detailed regulations."

781 F. Supp. at 947. Judge Weinstein, based upon the undisputed evidence, concluded as follows:

> "They (defendants) are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. Although the defendants later produced and delivered Agent Orange under the control of federal officers, these subsequent acts are distinct from the earlier acts of product and manufacturing design being sued upon. The government sought only to buy read-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiff's injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking."

781 F. Supp. at p. 450; emphasis ours.

The court below, though having before it the very same defendants, causes of action, removal/remand issue under 1442(a)(1) and the very same evidence as were before Judge Weinstein, reached a diametrically opposite holding. 149 F.3d at 397-400, 401; App. A-62 to A-67, A-71 (ftnte 16). The court, erroneously we submit, gave a broad interpretation to 1442(a)(1) with regard to the issue of "acting under", even though it did articulate the test essentially correctly:

> "The second factor necessary for Sect. 1442 removal is a finding that the defendants acted pursuant to a federal officer's directions and that a causal nexus exists between the defendants' actions under color of federal office and the plaintiff's claims (in the state court action)."

149 F.3d at 398.

The court below quoted from the affidavit of John P. Frawley of defendant Hercules but that very same affidavit was before Judge Weinstein.[7] The court below then articulated its disagreement with Judge Weinstein as follows:

> "Judge Weinstein determined that remand was proper because he found that the defendants had failed to satisfy the second prong of the Federal Officer Removal Statute – that they acted under color of federal office. *Ryan*, 781 F.Supp. at 950. Judge Weinstein, although acknowledging that the case presented a close question, held that the defendants had not demonstrated sufficient government control over the production of Agent Orange because '[t]he government sought only to buy ready-to-order herbicides.' *Id.* He found it determinative that the defendants had formulated, produced and commercially sold all of the component parts of Agent Orange, albeit in different compositions, before government involvement. *Id.* Our reading of the record, however, reflects that the alleged deadly properties of Agent Orange result from the particular mixture of the component chemicals that the government dictated."

[7] Such affidavit is expressly cited and discussed by Judge Weinstein in his opinion. 781 Supp. at 937.

149 F.3d at p. 401; ftnte. 16. The last statement in the foregoing quote is rather astounding. Apparently the court below believed that some "synergistic" effect arose from mixing 2,4,5-T and 2,4-D. But there was no evidence of any synergistic effect – absolutely none – in the record.

Indeed, the court below simply overlooked or ignored the undisputed fact, thoroughly discussed by Judge Weinstein, 781 F. Supp. at 93., 938, that the essence of plaintiff's claims is that dioxin was the culprit and the dioxin was already in the components of Agent Orange long before they were ordered by the government, mixed and used in Vietnam.[8]

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[8] As Judge Weinstein stated:
"As affidavits from some defendants' employees indicate, the component elements of the herbicides delivered to the Defense Department, including the elements whose production generated dioxin, were developed and used long before the Vietnam war. *See. e.g., Affidavit of John P. Frawley, p. 2 (*March 1980) (Hercules employee); *Affidavit of William J. McCarville* p. 4 (Dec. 10, 1991) (Monsanto employee); *Affidavit of Michael M. Gordon* p. 4 (Dec. 12 1991) (Diamond Shamrock counsel); *see also In re "Agent Orange" Prod. Liab. Lit.*, 597 F.Supp. 740, 848-49 (E.D.N.Y. 1984) (noting that Agent Orange was 'closely related to shelf products with which the chemical companies had a good deal of familiarity from the civilian market' and that 'defendants had years of experience with the herbicide's components')." 781 F.Supp. at 937.

Thus, we have abroad in the federal judiciary two diametrically opposed holdings with regard to 1442(a)(1) – *Ivy/Ryan* versus this case. [9] This conflict should, we respectfully submit, be resolved as only it can be - by this Honorable Court.

Another reason supporting the grant of writ in this case is that the court below is wrong and *Ivy/Ryan* is eminently correct. Indeed, the weight of authority supports Judge Weinstein's analysis in *Ivy/Ryan*. See cases cited in footnote 9. The *Good* case is especially instructive. In that case, former members of the U.S. Navy, who worked on several vessels containing turbine generators which allegedly emitted asbestos, thus causing personal injuries, brought suit in state court against the manufacturer of the generators. The manufacturer removed to federal court under 1442(a)(1).

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[9] The cases, which have held similarly to, or expressly followed, *Ivy/Ryan* are: *Lovell Manufacturing v. Export Bank*, 843 F.2d 725 (3rd Cir. 1988); *North Carolina v. Ivory*, 906 F.2d 999 (4th Cir. 1990); *First National Bank v. Aberdeen National Bank*, 627 F.2d 843, 848 (8th Cir. 1980); *Gulati v. Zuckerman*, 723 F.Supp. 353 (E.D. PA. 1989); *Brown and Williamson Tobacco Corp. v. Wigand*, 913 F.Supp. 530 (D.C.Ky. 1996); *Kaplansky v. Associates, YM-YUHA*, No. 88-CV-1292, 1989 WL 29938 (E.D.N.Y. 1989); *Good v. Armstrong World Industries*, 914 F.Supp. 1125, 1130, 1131 (E.D.PA. 1996); *U.S. v. Vertac Chemical Corp.*, 841 F.Supp. 884 (E.D. Ark. 1993); *Ruffin v. Armco Steel Corp.*, 959 F.Supp. 770 (S.D. Tex. 1997); *Arnold v. Blue Cross & Blue Shield of Texas*, 973 F.Supp. 726 (S.D. Tex., 1997); *Guillory v. Ree's Contract Services, Inc.*, 872 F.Supp. 344 (S.D. Miss. 1994); and *Arness v. Boeing North Amer. Inc.*, 997 F.Supp. 1268 (N.D. Cal. 1998). The district court cases which have ruled against remand on such issue are: *Akin v. Big Three Industry Inc.*, 851 F.Supp. 819, 822 (E.D. Tex. 1994); *Pack v. AC and S, Inc.*, 838 F.Supp. 1099 (D.C. Md. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569, 571-72 (N.D. Cal. 1992); and the decision of the courts below in this case.

In granting the plaintiffs' motion to remand, the court relied upon, and extensively cited, Judge Weinstein's opinion in *Ivy/Ryan* and stated:

> "This factual recitation evidencing the conglomerate of people employed by the United States Navy who had oversight authority, does not support the blanket assertion by Westinghouse that the Secretary of the Navy provided direct detailed control over Westinghouse. The suggestion in the notice of removal that the Secretary of the Navy was connected to the design and manufacture of turbines by Westinghouse is not supported by the record and indeed is refuted by the record. At most, the Secretary appears to have been the official outer point of multiple layers of individuals employed by the federal government who worked with Westinghouse during the design and manufacture of the turbines. Although it is true that the United States Navy and many individuals employed by the Navy worked with Westinghouse, Westinghouse does not show that the Secretary of the Navy or any other federal officer directly controlled and supervised the work of Westinghouse."

914 F. Supp. at 1129.

In *Vertac*, while the case did not involve removal under 1442(a)(1) but involved the question whether the U.S. had sufficient control over the Agent Orange manufacturer, Hercules, to make the U.S. liable as an "arranger" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Sect. 107 (a) (2), 42 U.S.C.A. Sect. 9607 (a) (2), ("CERCLA"), the court expressly followed Judge Weinstein's reasoning in the *Ivy/Ran* decision that there was a lack of compulsion or control with respect to the "ready to order" Agent Orange herbicides used in the Vietnam War. 841 F.Supp. at 890.

Ruffin involves a state court suit for damages arising out of an asbestos-related death. Defendant Armco removed under 1442(a)(1), asserting that governmental officials controlled and directed the construction of ARMCO's steel plant (which is where the alleged asbestos was situated). Citing and quoting from *Ivy/Ryan* extensively, 959 F. Supp. at 775, 776, the court remanded the case to the state court, noting:

> "Critical under the statute is 'to what extent defendants acted under federal direction' at the time they were engaged in the conduct now being sued upon."

959 F. Supp. at 775. As noted above, *Ivy/Ryan* made it clear that the alleged defective design and manufacture of the 2,4,5-T and 2,4-D occurred long before the sale of the Agent Orange to the Government.

With regard to failure to warn allegations in the state court suit, *Ruffin* had this to say:

> "Because the claims asserted by the Estate in this case are predicated on negligence and limited to a failure to warn theory of liability, Armco must show that the government authority it operated under directly interfered with its ability to fulfill its state law obligation to warn its employees of safety hazards. *See Ryan*, 781 F.Supp. at 950 (holding removal improper under Sect. 1442(a)(1) because defendants were sued for producing a product comprised of components developed without government control and although defendants were required under war contract to supply the government with product requisite connection between defendants' conduct and state law action was missing)."

959 F.Supp. at 976.

In this case, the allegations of failure to warn in the plaintiff's petition pertain to the failure of the defendants to advise the decision-makers in the United States Government – for example, the President, Secretary of Defense, the Chairman of the Joint Chiefs of Staff and the commanding officers in Vietnam such as Admiral Zumwalt – that the Agent Orange contained dioxin and of the real hazards of such herbicide. It is the plaintiffs position that, had the defendants so warned, the Agent Orange probably would not have been used and only those herbicides that did not contain dioxin would have been used. Again, the Government certainly never sought to exercise control over the defendants so as to prevent them from telling the Government decision-makers the truth about the dioxin and its potential hazards. The plaintiff never contended that any labels, that might have been put upon the containers had it not been for the mandate of the government, would have been seen by any of the veterans or civilians in any event. Therefore, this case is not, and never has been, the classic "failure to warn to users" product liability case. It has always been a defective and negligent design and manufacture case, relating to the presence of dioxin in the Agent Orange, along with the alleged failure to warn the decision-makers.

In *Arness*, a state court suit was filed against federal contractors asserting environmental pollution in violation of state law. The defendant contractors removed under 1442(a)(1) and plaintiffs filed a motion to remand. In granting the motion to remand, the court, citing and quoting from *Ivy/Ryan*, held that, while the government did order the defendants "to flush rocket engine hardware with TCE (the complained-of chemical) 'to satisfy the government's production requirements'", the plaintiffs "lawsuit is premised on BNA's disposal of TCE, not its use of TCE." 997 F. Supp. at 1273-1276; emphasis ours.[10]

Finally, in *Guillory* the court, after citing and thoroughly discussing *Ivy/Ryan*, held that:

> "Certainly, the contract, as well as the guard post assignment, establishes some basic parameters within which Ree's services are to be performed. However, based on the totality of the evidence, the court can conclude only that the relevant acts occurred under the general oversight of a federal officer. Defendants simply have not demonstrated the type of detailed direction necessary to support the removal. Accordingly, the court concludes that plaintiff's motion to remand must be granted."

872 F. Supp. at 348.

In many of the federal contractor cases, wherein the courts have refused to remand after removal under 1442(a)(1), the courts have gone out of their way to distinguish *Ivy/Ryan*, not to reject it, as the court below did.

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[10] And in *Arnold* the court cited and relied upon *Ivy/Ryan* in rejecting removal under 1442(a)(1). 973 F. Supp. at 740-743.

See *Pack v. AC and S, Inc.*, 538 F.Supp. 1099 (D.C.Md.1993). And in *Fung v. Abex Corp.*, the court stated:

> "*Ryan* is also distinguishable from the instant case since defendants in *Ryan* were being sued for formulating and producing a product of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. *Ryan*, 781 F.Supp. at 950. While the government contracted defendants to build submarines in the instant case, it monitored General Dynamics' performance at all times and required the defendant to construct and repair the vessels in accordance with the applicable and approved specifications incorporated into the contract."

815 F.Supp. at 572, 571.

In *Crocker v. Borden Inc.*, 852 F. Supp. 1322 (E.D. LA., 1994), the court acknowledged that "the third *Mesa* requirement is that Westinghouse must demonstrate a causal nexus between the claims against it and the acts it performed under color of federal office," 852 F.Supp. at 1327, but made the same finding of nexus that was made in *Fung*, which was factually similar to *Crocker*.

However, based upon its statement of facts, *Akin* cannot be distinguished from *Ivy/Ryan*. The district judge who decided *Akin* is also the district judge who decided this case (Judge Cobb).[11] Now that the Fifth Circuit has affirmed the district court in this case, a stark and unmitigated conflict among the decisions of the federal courts has been presented.

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[11] As noted by Judge Cobb in his decision in this case:

"This court respectfully disagrees with the decision in *Ryan*."

901 F.Supp. at 1200.

Another reason the Court should, we submit, grant writ with regard to the 1442(a)(1) removal in this case is the impact of the issue upon the venerable doctrine of federalism. Judge Weinstein focused upon this consideration in *Ivy/Ryan*:

> "From the standpoint of federalism, its mere assertion of a nebulous federal procurement interest cannot, without further specification, be a basis for removal. Otherwise any state suit against a manufacturer whose product has at one time been diverted and adapted for military use – for example, a nuisance suit against a metal foundry – would potentially be subject to removal, seriously undercutting the power of the state courts to hear and decide basic tort law. Such a result is incompatible with the respect owed to state courts under our federal system."

781 F.Supp. at 951.

Plaintiff certainly agrees with that observation. However, efforts by federal contractor defendants, encouraged by decisions such as *Akin* and the decision in this case, are a cause of serious concern. Many lower federal courts seem to have lost sight of this court's admonishment in *Shamrock Oil and Gas v. Sheets*, 313 U.S. 100, 61 S.Ct. 868, 872 (1941):

> "The policy of the successive acts of Congress regulating the jurisdiction of the federal courts is one calling for the strict construction of such (removal) legislation. The power reserved to the states under the constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, require that they scrupulously confine their jurisdiction to the precise limits which the statute has defined."

61 S.Ct. at 872.

Finally, important questions of federal procurement policy suggest the need for intervention by this Court. Again, Judge Weinstein mentioned the potential impact upon federal procurement policy:

> "The point is not that section 1442(a)(1) is necessarily inappropriate to protect the enforcement of federal procurement policy. It is that removal is not appropriate when the civil or criminal suit brought in state court has only a speculative impact on such policy. In this respect the defendants are in an altogether different position from the private insurers, which as Medicare intermediaries, have relied on section 1442(a)(1). *See* cases cited in Part II.B.2.b., *supra*. The insurers act as continuing conduits for government policy and the state court lawsuits had the potential to interfere with an ongoing federal program. The defendants, by contrast, are being sued entirely for past acts in allegedly providing a tainted product to the government."

781 F.Supp. at 951.

In the final analysis, a detached and objective reading of 1442(a)(1) and its congressional history raises the question of whether it was ever intended to be extended as far as government contractors are seeking to extend it. With the direct conflicts among the lower courts and the other considerations discussed above, it is clear, we respectfully submit, that this is a question that urgently needs to be resolved by this Honorable Court.[12]

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[12] There are certain hypothetical situations wherein Judge Weinstein felt the federal contractor could properly remove the case to federal court. See 781 F. Supp. at 941-944, 945-952. Plaintiff does not agree with this thinking and urges the Court to grant writ and limit 1442(a)(1) to its original intent. In any event, whether or not the Court goes beyond the precise question presented, at the very least, it is, we respectfully submit, extremely important for the Court to resolve the direct conflict between *Ivy/Ryan* and this case.

II.

The Question of Whether the Doctrine of Collateral Estoppel Is Applicable Where the Party Opposing Estoppel Claims It Did Not Have A Right To Appeal The Earlier Decision, Needs Resolution By This Court.

In this Court's seminal decision establishing the right to offensive collateral estoppel, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L. Ed.2d 552 (1979), the Court noted:

> "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."

99 S.Ct. at 649. The Fifth Circuit articulated the principle elements of collateral estoppel as follows:

> "(1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine."

Winters, 149 F.3d at 391.

In this case, the court below does not take issue with the fact that all of the first three stated elements were satisfied. 149 F.3d at 391 – 396. As to the last element, "unfairness," in *Parklane* this Court gave three examples of when it would be "unfair" to apply the doctrine of collateral estoppel:

> "In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. ... First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result."

99 S.Ct. at 652. The Fifth Circuit did not conclude that any one of the three examples set out in *Parklane* applied in this case. Instead, it reached out to a purported ground for "unfairness" not mentioned nor discussed in *Parklane*: that, because the prior proceeding involved an order (remand order) from which the usual right to appeal has been purportedly prohibited by statute, it would be "unfair" to collaterally estop the defendants with respect to such prior order in a subsequent judicial proceeding. 149 F.3d at 391-396.

This holding by the court below is directly contrary to the prior holding of this Court, earlier decisions of the Fifth Circuit and other circuit courts and federal decisions. Early on, this Court, in *Johnson Steel St. Rail Co. v. Wharton*, 152 U.S. 252, 14 S.Ct. 608 (1894), was confronted with the question of whether a judgment – obtained in a prior proceeding from which the losing party could not appeal because the amount in controversy

was too small – could constitute res judicata in a subsequent proceeding. The Court stated:

> "The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment – whatever the nature of the question decided, or the value of the matter in dispute – had jurisdiction of the parties and the subject matter, and whether the question sought to be raised in the subsequent suit was covered by the pleadings, and actually determined in the former suit. The existence or nonexistence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot, in any case, control this inquiry."

14 S.Ct. at p. 611; emphasis ours. There are numerous other federal decisions applying this same rule, and some have extended it to collateral estoppel situations. See *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634 (5th Circ. 1974);[13] *Johnson v. Herold*, 161 F. 603 (Cir. Ct., N.J. 1907); *Winters v. Lavine*, 574 F.2d 46, 62 (2nd Circ. 1978);

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[13] *Napper* is precisely in point. It is a removal case, wherein the prior court remanded because it found there was a lack of removal jurisdiction in view of the absence of diversity. In a subsequent proceeding, the defendant argued against estoppel on the question of diversity on the theory that, since defendant could not appeal from the prior remand order, it should not be estopped to show diversity and removal jurisdiction in that subsequent proceeding. The court rejected that argument and held that estoppel applied. The court stated:

> "As between the two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action. *Johnson Company v. Wharton*, 1894, 152 U.S. 252, 14 S.Ct. 608, 38 L.Ed. 429."

500 F.2d at 636, 637. The reasoning of the court of appeals in this case as to how it could distinguish this case from the rationale of its own decisions in *Napper* and *Frith* is really strained. See ftnte 14, infra. But the obvious discord between the Fifth Circuit in this case and its prior decisions in *Napper* and *Frith* point up all the more reason why this Court should intervene.

Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Circ. 1975) (applying collateral estoppel to finding of no fraudulent joinder in removal/remand determination in a prior proceeding); see the dicta in *F.T.C. v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Circ. 1977); and see *In re Life Ins. Co. of N. Amer.*, 857 F.2d 1190, 1193 (8th Cir. 1988) (holding that findings in remand hearing have preclusive effect). The court in *Winters v. Lavine* stated pertinently:

> "We believe that there are two reasons why the Appellate Division's decision should retain its preclusive effect despite Winters' inability to appeal from it as of right. First, even if there were no opportunity whatsoever for Winters to appeal the Appellate Division's ruling, that decision would still retain its preclusive effect, for the extent of preclusion produced by a prior judicial determination of material and essential issues is not affected by the fact that the losing party could not appeal that determination to a higher court. *Johnson Co. v. Wharton*, 152 U.S. 252, 256-57, 260-61, 14 S.Ct. 608, 38 L.Ed. 429 (1894); *Ex parte Pennsylvania*, 109 U.S. 174, 176, 27 L.Ed. 894 (1883); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636-37 (5th Cir. 1974), *cert. denied* 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *Elk Garden Co. v. T. W. Thayer Co.*, 206 F. 212, 215 (W.D.Va. 1913), *writ of error dismissed with consent of defendant in error*, 228 F. 1021 (4th Cir. 1915)."

574 F.2d at 62.

Somewhat related to the point here is the *Munsingwear* doctrine, formulated in *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104 (1950). There the court held that a prior determination, wherein an appeal therefrom was dismissed as moot, could still provide the basis for collateral estoppel or res judicata. For a thorough discussion of *Munsingwear*

doctrine, see *Milton S. Kronheim & Co. v. District of Columbia*, 91 Fed 3d 193, 212 (D.C. Cir. 1996).

On the other hand, there are a number of cases, aside from this case and the decision of the court below, that appear to be in direct conflict with the holding in *Johnson Steel*.[14] See the comment of this Court in *Standefer v. U.S.*, 447U.S. 1023, 100 S.Ct. 1999, 2007 (1980) that the unavailability of appellate review "strongly militates against giving" a judgment preclusive effect; *Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993);[15] *Baldridge v. Kentucky Ohio Transp., Inc.*, 983 F.2d 1341,

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[14] The court below acknowledged the decision in *Johnson Steel* but, in what appears to be very superficial reasoning, tried to distinguish it, stating:

> "The Supreme Court decided in 1894 that unavailability of appellate review alone could not preclude the application of the doctrine of res judicata. *Johnson Steel Street Rail Co. v. Wharton, Jr. & Co.*, 152 U.S. 252, 261, 14 S.Ct. 608, 38 L.Ed. 429 (1894). The Court held that the existence or nonexistence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot in any case control [the inquiriy into the application of the doctrine or res judicata]." . . .
>
> We note, however, that the *Johnson Steel* case, issued in 1894, was a 'true' res judicata decision, rendered before nonmutual collateral estoppel was even recognized. *Napper* and *Frith* are also pre-*Parklane* and involved mutual – not *nonmutual* offensive – estoppel decisions. Furthermore, as noted *supra* note 9, the rules applicable to offensive collateral estoppel generally are more restrictive."

149 F.3d at 396, ftnte. 11.

[15] In *Nutter*, the court stated:

> "[W]e do not believe the district court's jurisdictional findings incident to remand should preclude relitigation of the same issues in state court. Accordingly, we hold that the district court's jurisdictional findings regarding complete preemption have no preclusive effect. Under our holding, any issues on remand may be relitigated in state court."

4 F.3d at 323.

1347-50 (6th Circ. 1993); *Whitman v. Raley's, Inc.*, 886 F.2d 1197, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Circ. 1986); and *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 356 (7th Circ. 1987).

We respectfully submit that the Court should resolve these conflicts among the federal courts. It is particularly necessary to do so because these conflicts center upon such important considerations as finality of judgments, economy of justice, fairness in not giving a party more than one day in court on a particular issue, the streamlining of the justice system through the application of res judicata and offensive collateral estoppel and the effect of the absence of the usual method of appeal with respect to the application of collateral estoppel and res judicata.

The judicial turmoil that is generated by decisions such as that of the court below, seizing as it does upon something so remote as the right to an appeal to preclude the application of such venerable doctrines as res judicata and collateral estoppel, we respectfully submit rises to the level of appropriate certiorari intervention.

We also point out that the defendants in this case were granted by the district court leave to appeal the remand decision in Ivy/*Ryan* under 28 U.S.C. 1292(b). The effect of a permissive appeal upon subsequent

collateral estoppel is discussed in *Winters v. Lavine*, 574 F.2d at 62 (discussing discretionary appeal under N.Y.C.P.L.R., Sect. 5602(a)(1)(i) and how it militates in favor of preclusive effect). Also, while 28 U.S.C. 1447(d) has been construed generally to preclude appeals from remand orders, there are exceptions, for example the *Thermtron* doctrine. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 353, 96 S.Ct. 584, 593 (1976) and, for an extension of that doctrine, *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992).

In the final analysis, the central question before the Court, with regard to the application of collateral estoppel in this case, is whether an order of remand can ever have collateral estoppel or preclusive effect. The court below essentially held that a remand order, or any order from which the usual right of appeal does not exist, can never have preclusive effect.[16] This is the holding that has created serious conflict among the federal courts and has significant impact upon the efficacy of the collateral estoppel doctrine.

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[16] The court below seemed to rely heavily upon Comment O of the Restatement (Restatement [Second] of Judgments, Sec. 27, comment O), which states that "the balance weighs in favor of preclusion... (because) the losing party has here obtained an appellate decision on the issue." However, we have not found where this Court has adopted comment O or given it the broad effect the court below has given it.

And, if the preclusive effect of a remand order is ever possible, certainly it should have that effect in this case. In *Ivy/Ryan*, defendants had the judge they had sought through the JPMDL and the judge who clearly had the most knowledge about the Agent Orange litigation (Judge Weinstein).[17] Defendants had a judge who, based on historical data, had ruled in favor of the defendants a great majority of the time. For example, in *In Re Agent Orange, 996* F.2d 1425, 1428-1430 (2nd Circ. 1993) the court discusses the long list of decisions in which Judge Weinstein had held favorably to defendants. Defendants were allowed by Judge Weinstein to put on all the evidence they wanted to. Judge Weinstein had even allowed defendants to add the 1442(a)(1) ground after the 30 day removal period had gone by. 781 F. Supp. at 939-941. Defendants were given all the time they needed to brief and argue the removal/remand under 1442(a)(1). Judge Weinstein also certified, at defendants' request, an interlocutory appeal on the remand issue. id. at 952, 953. Defendants had two shots in the court of appeals, one on interlocutory appeal and the other on the petition for mandamus. No one can say, therefore, that defendants did not have a fair and complete opportunity with respect to the 1442(a)(1) issue, to present their version of the facts and law.

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[17] To be sure, Brown and White, the two civilians in *Ivy/Ryan*, filed suit in the Texas state court and it was defendants who removed the case to federal court in Texas and then successfully had the case transferred to Judge Weinstein via the Judicial Panel On Multi-District Litigation.

In sum, the issue of collateral estoppel, like the issue of 'acting under' within the meaning of 1442(a)(1) is – with the direct conflicts among the federal courts, the importance of questions dealing with the finality of judgments and economy of justice and the efficacy of the offensive collateral estoppel doctrine – very ripe for consideration by this Court.

III.

The Question of Whether a Corporation Is A "Person" Within The Meaning of 1442(a)(1) Is Also Deserving of Intervention By This Court.

In *Ivy/Ryan*, Judge Weinstein concluded that a corporation can be a "person" within the meaning of 1442(a)(1), 781 F. Supp. at pp. 946, 947 and, in so holding, noted the division among the courts on this issue. See footnote 6, supra.

A reading of the cases cited in that footnote discloses reasonable rationales for the holdings in both of these lines of authority. Part of the reason these diametrically opposed camps have arisen in the federal judiciary is that, as Judge Weinstein noted, the "(l)egislative history is … unilluminating." Id. at 946.

Since the use of 1442(a)(1) for removal purposes is rapidly increasing, we respectfully submit that it is ever more important for the Court to resolve this conflict among the federal courts.

We submit that a reasonable extension of this Court's decision in *International Primate Protection League v. Administration of Tulane Educ. Fund*, 500 U.S. 72, 111 S.Ct. 1700 (1991) – wherein the court held that the phrase "person acting under" should be construed narrowly and that it was not meant to include "government agencies" – is that "persons acting under" also does not include corporations.

Whatever the correct interpretation of that phrase, we submit that it must come from this Court. This case is an appropriate vehicle for the Court to resolve this extremely important question.

IV.

The Statute of Limitations Issue

Because, once the Court decides that this case should have been remanded, every action of the courts below following the erroneous denial of the motion to remand becomes void, there is no real need to discuss the grant of summary judgment by the courts below. However, out of an abundance of caution, we want the Court to know that the courts below erred with regard to the limitation issue because they misinterpreted and/or misapplied the Texas discovery rule.

With all due respect, the courts below seemed to forget that their function was not to decide the factual issue of "discovery of the injury and its cause" but simply to decide whether a factual dispute as to that issue existed. Clearly, the deposition of Margaret Winters establishes such a fact issue. See A-81 to A-91. Whether she was telling the truth when she testified under oath that she did not discover that her NHL may have been caused by her exposure to Agent Orange in Vietnam until within two years of the filing of her suit, is unquestionably a matter for the jury or fact-finder.

The irony is that the Texas "discovery rule" was accurately described by the court below in another of its decisions, *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1092 (5th Cir. 1991) cert. den. 112 S.Ct. 1778 (1992):

> "The parties agree that in Texas a two year statute of limitations controls this products liability action. *See* Tex. Civ. Prac. & Rem. Code Ann. Sect. 16.003. Texas has adopted a discovery rule for determining when a cause of action accrues for certain classes of cases. See *Gaddis v. Smith*, 417 S.W.2d 642, 644 (Tex.1988). The limitation period for a products liability action does not begin to run until a plaintiff discovers or should have discovered his injury and its cause in fact. *Mann v. A.H. Robins Co.*, 741 F.2d 79, 82 (5th Cir. 1984); *see also Woodruff v. A.H. Robins Co.*, 742 F.2d 228, 229 (5th Cir. 1984). The statute of limitations did not accrue in this case until Roy Ghent knew or should have known that his injuries resulted from exposure to asbestos."

946 F.2d at 1092; emphasis ours.

Indeed, how could a court hold that Ms. Winters should be expected, as a matter of law, somehow to know that Agent Orange causes NHL over two years before the suit was filed in early 1993, when the Second Circuit, in that very same year, stated:

> "In addition, despite continuing research, the crucial issue of 'general causation,' i.e. whether any injuries are attributable to Agent Orange, remains unsettled. As one 1992 commentator noted, reviewing scientific literature: 'To date there has been no conclusive evidence that exposure to Agent Orange is carcinogenic, mutagenic or teratogenic in humans. Furthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported.' 13B Arthur L. Frank, Courtroom Medicine: Cancer 25A-4."

In Re Agent Orange, 996 F.2d 1425, 1436-37 (2nd Cir. 1993).[18]

In any event, once this case is remanded to the state courts of Texas they will, no doubt, follow the rule established long ago in Texas that the plaintiff must discover not only the injury but also the cause of the injury before the limitation period begins to run.

Conclusion

The Court has before it, by virtue of this Petition, three extremely important issues – all of which are hotly disputed among the federal courts,

[18] Of course the study by Congress and other epidemiological studies have, in the last five years, made it clear that there is more than enough scientific support to establish a causal connection between exposure to Agent Orange and NHL.

all of which involve crucial questions in the field of removal/remand law and collateral estoppel and all of which are very ripe for intervention and resolution by this Honorable Court.

Wherefore, Plaintiffs request this Court to grant writ of certiorari on all three questions presented.

Respectfully submitted,

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